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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
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| 10/066,552 | 01/31/2002 | Clayton N. Cowgill | 1087-RIO446<br>(18235-05422) | 2737 |

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| EXAMINER | |
|---|---|
| SELLERS, DANIEL R | |

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

| Office Action Summary | Application No. | Applicant(s) | |
|---|---|---|---|
| | 10/066,552 | COWGILL ET AL. | |
| | Examiner | Art Unit | |
| | Daniel R. Sellers | 2615 | |

*-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --*

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

1)☒ Responsive to communication(s) filed on *24 April 2007*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

4)☒ Claim(s) *27-30,32-41 and 47* is/are pending in the application.

4a) Of the above claim(s) *42-46* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *27-30, 32-40* is/are rejected.

7)☒ Claim(s) *41 and 47* is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

**Application Papers**

9)☐ The specification is objected to by the Examiner.

10)☒ The drawing(s) filed on *31 January 2002* is/are: a)☒ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

## DETAILED ACTION

### *Election/Restrictions*

1. **Claims 42-46** are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on 4/24/07.

### *Response to Arguments*

2. Applicant's arguments, see p. 6, filed 4/24/07, with respect to claim 39 have been fully considered and are persuasive. The rejection of claim 39 under 35 USC 112 has been withdrawn.

3. Applicant's arguments filed 4/24/07 have been fully considered but they are not persuasive.

4. Regarding claim 27, the combination of Curtin, Studor, and Goodman teaches these features. Studor teaches that various playback parameters can vary in accordance with a monitored characteristics, including environmental sensors (Col. 4, lines 1-19). Studor teaches a sequencer, or a processor, to vary these playback parameters (Col. 3, lines 46-67 and Fig. 1, unit 12). Therefore the combination teaches a processor to receive biometric data and to select one of a plurality of audio tracks according to the biometric data.

5. Regarding claim 28, the further limitation of claim 27, see the preceding argument with respect to claim 27. The combination teaches these features.

6. Regarding claim 35, see the preceding argument with respect to claim 27. The combination teaches a processor with these features.

7. Regarding claims 37 and 38, the further limitation of claims 35 and 37 respectively, see the preceding argument with respect to claim 27. The combination teaches these features.

8. Regarding claims 29-30, 32-34, and 39-40, see the preceding argument with respect to claim 27. The combination teaches these features.

9. Regarding claim 36, see the preceding argument with respect to claim 27. The combination teaches these features.

10. In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988)and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, it would have been obvious to combine Curtin, Studor, and Goodman using knowledge generally available to one of ordinary skill in the art. Goodman is relied upon to show MP3 data has an associated tempo and the combination of Curtin and Studor select a track using a determined tempo according to biometric data.

***Claim Rejections - 35 USC § 103***

11. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

12. **Claims 27-28, 35, and 37-38** are rejected under 35 U.S.C. 103(a) as being unpatentable over Curtin (USPN 5,986,200) in view of Studor et al. (USPN 6,152,856) and Goodman et al. (USPN 6,928,433) (hereinafter Curtin, Studor, and Goodman respectively).

13. Regarding **claim 27**, Curtin teaches a portable audio player (Fig. 1 and 2) comprising:

> *a memory to store data associated with a plurality of audio tracks;* (Col. 3, lines 1-23) *and a processor coupled to the memory, the processor to receive biometric data and to select one of the plurality of audio tracks according to the biometric data* (Col. 4, lines 1-19).

Curtin teaches a portable audio player that changes at least the tempo of an audio track according to biometric data, or a heart rate of the user, but Curtin does not specifically teach the selection of a track according to the data (Col. 4, lines 4-9).

Studor teaches an interactive exercise device (abstract), which uses similar sensors (Col. 6, lines 37-44). Specifically, Studor teaches the selection of one audio track among a plurality according to an optimum workout level or during different portions of the workout (Col. 13, lines 44-63). It would have been obvious for one of ordinary skill in the art at the time of the invention to combine the teachings of Curtin and Studor for the purpose of keeping a user engaged, or interested, in an exercise routine. However, the combination does not teach a particular audio track has an associated tempo.

Goodman teaches that an audio track can be categorized via metadata by tempo (Fig. 8 and Col. 7, line 65 - Col. 8, line 8). It would have been obvious for one of ordinary skill in the art at the time of the invention to combine the teachings of Curtin, Studor, and Goodman for the purpose of selecting a track according to its tempo.

14. Regarding **claim 28**, the further limitation of claim 27, see the preceding argument with respect to claim 27. The combination teaches that the biometric data is a pulse rate, or heart rate.

15. Regarding **claim 35**, see the preceding argument with respect to claim 27. The combination teaches an apparatus that performs this method.

16. Regarding **claim 37**, the further limitation of claim 35, see the preceding argument with respect to claim 28. The combination teaches biometric data comprising pulse rate data.

17. Regarding **claim 38**, the further limitation of claim 37, see the preceding argument with respect to claim 27. It is inherent that a pulse rate monitor supplies a pulse rate associated with a user.

18. **Claims 29, 30, 32-34 and 39-40** are rejected under 35 U.S.C. 103(a) as being unpatentable over the combination of Curtin, Studor, and Goodman as applied to claim 27 above, and further in view of Krupka et al. (USPN 6,132,337) (hereinafter Krupka).

19. Regarding **claim 29**, the further limitation of claim 27, the combination of Curtin and Studor teach a heart rate monitor, however they do not provide detail into how this sensor communicates to the portable audio player. Krupka teaches a body-mounted

transducer to monitor biometric data (Col. 3, lines 59-65 and Fig. 1, unit 24) that communicates to the audio player via a communication port, or receiver (Fig. 1, unit 12). It would have been obvious for one of ordinary skill in the art at the time of the invention to combine the teachings of Curtin, Studor, Goodman, and Krupka for the purpose of providing the biometric data to the audio player. In the prior combination, the method of providing the biometric data was not taught and was left up to the imagination of a skilled artisan. Krupka provides one method of gathering and providing the biometric data, as discussed above.

20. Regarding **claim 30**, the further limitation of claim 29, see the preceding argument with respect to claim 29. The combination teaches a pulse rate monitor.

21. Regarding **claim 32**, the further limitation of claim 27, Krupka teaches changing the tempo of a musical piece according to a threshold, wherein the biometric data exceeds a threshold (Col. 5, lines 8-13).

22. Regarding **claim 33**, the further limitation of claim 27, see the preceding argument with respect to claim 27. Studor teaches the recording of biometric data in memory (Col. 6, lines 37-44).

23. Regarding **claim 34**, the further limitation of claim 33, see the preceding argument with respect to claim 29. Krupka teaches a communications port for sending biometric data to the portable audio player.

24. Regarding **claim 39**, the further limitation of claim 37, see the preceding argument with respect to claims 31 and 32. The combination teaches a threshold

comparison, which selects a first audio track when the biometric data exceeds a threshold and a second track when the biometric data falls below a threshold.

25. Regarding **claim 40**, the further limitation of claim 35, see the preceding argument with respect to claim 29. Krupka teaches a particular format for the biometric data, wherein the data is formatted to be sent wirelessly to the portable audio player (Fig. 3, unit 24).

26. **Claim 36** is rejected under 35 U.S.C. 103(a) as being unpatentable over the combination of Curtin, Studor, and Goodman as applied to claim 35 above, and further in view of Gavish et al. (USPN 6,662,032) (hereinafter Gavish).

27. Regarding **claim 36**, the further limitation of claim 35, see the preceding argument with respect to claim 27. Curtin teaches that various parameters of an audio track can be changed according to biometric data. However, Curtin does not teach that the parameters are the volume of an output of the portable audio player. Gavish teaches that the volume can be controlled according to received biometric data (Col. 35, lines 23-29). It would have been obvious for one of ordinary skill in the art at the time of the invention to combine the teachings of Curtin, Studor, Goodman, and Gavish for the purpose of inspiring the user to work harder or to slow down.

***Allowable Subject Matter***

28. **Claim 41** is allowed.

29. Regarding **claim 41**, the prior art discussed does not teach a communications port between a portable audio player and a pulse rate monitor, wherein the portable audio player powers a pulse rate monitor that collects biometric data.

30. **Claim 47** is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

31. Regarding **claim 47**, the further limitation of claim 34, see the preceding argument with respect to claim 41. The claim is objected to for the same reasons.

***Conclusion***

32. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Daniel R. Sellers whose telephone number is 571-272-7528. The examiner can normally be reached on Monday to Friday, 9am to 5:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sinh Tran can be reached on (571)272-7564. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

SINH TRAN
SUPERVISORY PATENT EXAMINER

DRS